No. 20302

In the

United States Court of Appeals

For the Ninth Circuit

CAPITAL INSURANCE & SURETY COMPANY, INC.,

Appellant,

vs.

JOHN V. KELLY as an individual, JOHN V. KELLY as an heir to the estate of Marjorie A. Kelly, deceased, JOHN KELLY, a minor, and DON V. KELLY, a minor, both heirs to the aforesaid estate, by and through JOHN V. KELLY, their father and next friend,

Appellee.

On Appeal from the District Court of Guam

Appellant's Opening Brief

WALTER S. FERENZ
BARRETT, FERENZ & TRAPP
Penthouse—1924 Broadway
Oakland, California 94612

Attorneys for Appellant

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

TEXT

No. 20302

In the

United States Court of Appeals

For the Ninth Circuit

CAPITAL INSURANCE & SURETY COMPANY, INC.,

Appellant,

vs.

JOHN V. KELLY as an individual, JOHN V. KELLY as an heir to the estate of Marjorie A. Kelly, deceased, JOHN KELLY, a minor, and DON V. KELLY, a minor, both heirs to the aforesaid estate, by and through JOHN V. KELLY, their father and next friend,

Appellee.

On Appeal from the District Court of Guam

Appellant's Opening Brief

JURISDICTIONAL STATEMENT

The jurisdiction of this action is vested in the District Court of Guam by § 22(a) of the Organic Act of Guam, as amended, 72 Stat. 178 (1958), 48 U.S.C.A. § 1424(a), and § 82(4) of the Guam Code of Civil Procedure, in that the amount alleged to be in controversy exceeds the sum of $2,000.00, exclusive of costs and interest. This Court has

jurisdiction of this appeal. 28 U.S.C.A., §§ 41, 1291 and 1294(4).

STATEMENT OF CASE

During the evening of October 24, 1964, Dale S. Jones, Jr. (appellant's insured) was involved in a two-car automobile accident. The insured was the sole occupant and driver of one of the cars and died at the scene of the accident. The occupants of the other car were John V. Kelly, appellee, and his wife, Marjorie. Appellee sustained personal injuries and his wife, Marjorie, was fatally injured. The appellee brought an action to recover for his injuries, car damage, and for the wrongful death of Marjorie, under Guam's direct action statute, against Capital Insurance & Surety Company, appellant as the insured's liability insurance company. At pretrial, the parties stipulated as to the amount of damages suffered by appellees and submitted the matter to the court on the issue of whether appellees have any cause of action against appellant insurance company when the insured died before the action was brought against the insurance company. The policy attached to appellant's answer was also admitted to be the policy in question. This same issue was raised by appellant's motion for judgment on the pleadings, which motion was denied.

The parties stipulated after pretrial that the insured died prior to the commencement of the action and that he was negligent in the operaion of his vehicle resulting in the accident causing the death and injuries upon which the action was based.

The parties submitted written briefs to the court and on May 14, 1965, the court handed down an opinion holding that abatement caused by the death of the insured tort-feasor is not a defense in Guam to a direct action against the tort-feasor's insurance company. Upon the entry of the

stipulation as the amount of injury and loss suffered by appellees, judgment was entered against appellant in the total amount of $14,000.00.

SPECIFICATION OF ERRORS RELIED ON

Appellant contends that the District Court of Guam erred in holding and deciding that the Guam direct action statute gave appellees a cause of action for personal injuries and for wrongful death against appellant insurance company where none existed against appellant's insured because of abatement.

STATUTES AND INSURANCE POLICY PROVISIONS INVOLVED

1. Guam's direct action statute, as it appears at § 43354, Government Code of Guam.

> Liability policy: direct action. On any policy of liability insurance the injured person or his heirs or representatives shall have a right of direct action against the insurer within the terms and limits of the policy, whether or not the policy of insurance sued upon was written or delivered in Guam, and whether or not such policy contains a provision forbidding such direct action, provided that the cause of action arose in Guam. Such action may be brought against the insurer alone, or against both the insured and insurer.

2. Guam's Financial Responsibility Law, as it appears in Chapter 7 of Title XXIV, Government Code of Guam, §§ 23525 et seq., a pertinent provision of which is provided in § 23529(a) as follows:

> Insurance. (a) No policy or bond shall be effective under Section 23528 unless issued by an insurance company or surety company authorized to do business in Guam, nor unless such policy or bond is subject, if the accident has resulted in bodily injury or death, to limits, exclusive of interest and costs, of not less than

Five Thousand Dollars ($5,000.00) because of bodily injury to or death of one person in any one accident and Ten Thousand Dollars ($10,000.00) because of bodily injury to or death of two or more persons in any one accident, and Five Thousand Dollars ($5,000.00) because of injury to or destruction of property of others in any one accident.

(For purposes of brevity, the entire law is not set forth in full.)

3. Guam's wrongful death statute, § 377, Guam Code of Civil Procedure, is as follows:

Actions for causing death, etc. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just.

4. Coverages C and D of paragraph I of Insuring Agreements of the policy involved in this case, read as follows:

Coverage C. Bodily Injury Liability. To indemnify the insured for all sums which he shall become legally obligated to pay as damages because of bodily injury, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.

The words "bodily injury," and the word "injury" when referring to bodily injury, shall be deemed to include "sickness or disease."

Coverage D. Property Damage Liability. To indemnify the insured for all sums which he shall become legally obligated to pay as damages because of injury

to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

QUESTIONS PRESENTED

The question presented by this appeal is whether Guam's direct action statute or any other provision of applicable law permits an injured party or the heirs of a deceased person to recover from an insurance company in Guam when the cause of action for personal injury and for wrongful death are abated by the death of the insured tort-feasor.

ARGUMENT

Neither the Guam Direct Action Statute Nor the Guam Financial Responsibility Law (Nor Any Other Provision of Guam Law) Provide a Direct Cause of Action for Personal Injury or Wrongful Death Against the Insurer of a Deceased Tort-Feasor When the Cause of Action Against the Tort-Feasor Is Abated by Reason of His Death.

Guam is a direct action jurisdiction as provided by § 43354 of the Government Code of Guam. This section reads in full as follows:

> "Liability policy: direct action. On any policy of liability insurance the injured person or his heirs or representatives shall have a right of direct action against the insurer *within the terms and limits of the policy,* whether or not the policy of insurance sued upon was written or delivered in Guam, and whether or not such policy contains a provision forbidding such direct action, provided that the cause of action arose in Guam. Such action may be brought against the insurer alone, or against both the insured and insurer." (Emphasis supplied.)

The law of Guam provides that when the tort-feasor dies prior to the commencement of any action against him,

all causes of action for wrongful death and personal injury are abated. In the written opinion filed herein, the Court states as follows:

> "The Guam Codes were originally adopted from California in 1933, at which time the California courts had held that torts of this kind did not survive the death of the tort-feasor.[1] When Guam took the California Codes, it took the construction placed upon such codes by the California courts, *United States v. Johnson,* 181 F.2d 577. *McClellan v. Automobile Ins. Co. of Hartford, Conn.,* 80 F.2d 344 (9 Cir. 1935), was a case which arose in Arizona but so many California cases are cited as to make it abundantly clear that survival did not exist. The plaintiffs herein do not contend to the contrary."

The insurance policy upon which the action below was based provides, in Coverages C and D, that the appellant insurance company will indemnify the insured for those amounts for which he shall become legally obligated to pay as damages because of bodily injury including death or property damage.[2]

This court has already held in *Sumait v. Capital Insurance & Surety Co.* (9th Cir. 1961), 296 F.2d 108, that in

---

1. *Severns v. California Highway Indemnity Exchange* (1929), 100 Cal. App. 384, 280 P. 213. But cf. *Hunt v. Authier* (1946), 28 Cal. 2d 288, 169 P.2d 913; *Moffett v. Smith* (1949), 33 Cal. 2d 905, 206 P.2d 353; and *Cort v. Steen* (1950), 36 Cal. 2d 437, 224 P.2d 723. The *Cort* case was decided after California amended its survival statutes to obviate the decisions in *Hunt* and *Moffett* cited above.

2. § 43357 of the Government Code of Guam provides that no insurance company shall use a policy form in Guam without first obtaining the prior approval of the Commissioner of Insurance. There is, of course, no contention in this case that the form of policy sued upon was not previously approved by the Commissioner, nor was it contended that the policy was in any way contrary to Guam law.

Guam a claimant in an action against an insurance company must bring himself "within the terms and limits of the policy." In *Sumait,* this court held that because the plaintiff had failed to establish any liability of insured to the plaintiff, the insurer could not be held liable.

The question, hence, reduces itself as to whether or not there is any basis to sustain the conclusion of the lower court that appellees are not precluded in their action by the abatement caused by the death of the insured.

The court below, in its opinion, appears to rely on the fact that the direct action statute read together with the Guam Financial Responsibility Law constitute a legislative pronouncement of a public policy sustaining appellant's liability despite abatement. However, the Guam Responsibility Law in its entirety, and in particular § 23528(f) which was cited by the Court, shows clearly that the Guam Responsibility Law, like that of California, is simply to encourage motorists to provide insurance or face a suspension of their driving licenses in the event of an automobile collision causing property damage or personal injury. It is in no sense a compulsory insurance law.[3] The non-insured motorist has the alternative of either depositing cash or bond or giving up his license. Where a motorist surrenders his license, the Financial Responsibility Law leaves an injured party with no financial recourse. Hence, the law taken as a whole can hardly constitute a legislative pronouncement of a public policy giving all injured parties

---

3. Compare the municipal ordinance in *Severns v. California Highway Indemnity Exchange* (1929), 100 Cal. App. 384, 280 P. 213, which required or made mandatory insurance (or a bond) for jitney operators. The court nonetheless held that despite the compulsory aspect of insurance, abatement by death of the tortfeasor did not permit a direct action against the insurer.

a source from which to seek damages, much less a direct action against an insurance company.

The trial court also relies heavily upon Louisiana authorities from which the court concluded that the Louisiana rule is that personal defenses available to the tort-feasor were not available to his insurer.[4]

The cases cited in the opinion are *Rome v. London & Lancoshire Indemnity Co.,* (La. App. 1936), 169 So. 133 and *McHenry v. American Employers Ins. Co.* (La. App. 1944), 18 So. 2d 840.

In *Rome,* the court held that in Louisiana the public policy preventing a tort suit against a public agency did not constitute a bar to a direct action against the agency's liability insurer. The bar of suit against the agency was sovereign immunity—a defense that in no way effected the cause of action. Abatement, on the other hand, destroys the cause of action itself and is not a mere shield or cloak belonging to a party.

The *McHenry* case, on close analysis, is equally not applicable to the case at bar. Plaintiff McHenry was injured when his wife, while backing an automobile insured by the defendant, lost control thereof and it struck the plaintiff husband. At the time the accident occurred, Mrs. McHenry, the driver of the car, was in the employment of the Welcome Wagon Service Company and the suit was against her employer's insurance company. Under a statute of Louisiana,[5] damages resulting from personal injuries to the wife did not form a part of the marital community but was the wife's separate property. Thus, the husband had no personal interest

---

4. Guam's direct action statute is patterned after Louisiana. LSA—R.S. 22:655.

5. Article 2402 of the Revised Civil Code, as amended and reenacted by Act 68 of 1902.

in whatever his wife may recover in an action for personal injuries. On the other hand, in Louisiana, if the husband recovered damages resulting from personal injuries, the amount recovered fell into the community and became a community asset in which the wife has an interest by virtue of the marital relationship. On this basis, counsel for the insurance company in the *McHenry* case contended, apparently as a matter of first impression, that a recovery for plaintiff McHenry would be contrary to public policy; that is, it would permit Mrs. McHenry to profit from a cause of action which she herself brought about by her own negligence.

Under procedures available in Louisiana, the State Court of Appeals certified this question to the Supreme Court of Louisiana seeking an advisory opinion upon the question of law raised by the defense.

In *McHenry v. American Employers Ins. Co.* (1944), 206 La. 70, 18 So.2d 656, the Supreme Court of Louisiana held that the mere fact that plaintiff and his wife were living together in community at the time plaintiff was injured as a result of wife's negligence, did not prevent plaintiff from recovering from the insurer. The court held that the community would not be enriched by recovery but would only secure reimbursement for a loss it had sustained.

The Court of Appeals then held, in *McHenry v. American Employers Ins. Co.* (1944), 18 So.2d 840, that the suit against the insurance company was properly brought under Louisiana law since the negligent operator of the vehicle insured by the defendant insurance company was an employee acting within the scope of her authority and that there was no public policy considerations to otherwise bar the suit.

Stated otherwise, it would appear to be the law as established by *McHenry* that because public policy would not prevent a husband from suing the insurance company of an employer of the wife, this ground is not a defense in any situation and hence is not a defense under the direct action statute.

Most certainly the *McHenry* case is not authority for the proposition that a defense which exists as between a tortfeasor and the injured party cannot be raised by an insurance company under a direct action statute in Louisiana.

The correct rule of Louisiana has been stated in Couch on Insurance 2d, § 45:789, pp. 685-686, as follows:

> "The direct action statute does not create an absolute liability on the part of the insurer nor does it create any tort liability where none existed before. Accordingly a direct action statute does not create a right of action where no liability otherwise existed under the contract of insurance. Hence, it is necessary that the claimant be able to show a tort liability of the insured to him before he can recover from the insured's insurer."
>
> *Finlay v. Std. Accid. Ins. Co.* (La.App. 1944), 19 So.2d 302; *Restelle v. Fidelity & Casualty Co.* (La.App. 1949), 41 So.2d 469; *Fortenberry v. Preferred Accident Ins. Co.* (La.App. 1950), 48 So.2d 657.

In *Degelos v. Fidelity & Casualty Co. of New York* (5th Cir. 1963), 313 F.2d 809, 815, the United States Court of Appeals in construing the Louisiana direct action statute stated the following rule:

> "Under the Direct Action Statute, the case may proceed against the insurer, but liability depends on legal liability of the assured. Whether, as the Act permits, the assured is joined with the insurer, the standard for recovery is identical."

Also in *Finn v. Employers Liability Assurance Corp.* (La.App. 1962), 141 So.2d 852, 864, the Louisiana court held as follows:

> "The statute is remedial in character rather than substantive, and does not create causes of action."

In *Dandridge v. Fid. & Cas. Co.* (La.App. 1939), 192 So. 887, the court held:

> "The insurer is like the principal debtor, and if the claim against the insured is not well founded in law, the insurer is not liable."

In *Wiechmann v. Huber* (Sup. Ct. Wis. 1933), 248 N.W. 112, the Supreme Court of Wisconsin held that an insurer is not liable under the Wisconsin direct action statute after the abatement by reason of death of the action against the insured. The *Wiechmann* case has not since been overruled in Wisconsin and appears to still be the present law of that state (insofar as abatement may still obtain). On two occasions the Supreme Court of Wisconsin discussed the *Wiechmann* case. In *Segal v. Ohio Casualty Co.* (Sup. Ct. Wis. 1937), 272 N.W. 665, the court stated at page 667:

> "In *Wiechmann v. Huber*, . . ., the assured died before action was begun by the representative of the deceased party, and the action for wrongful death abated thereby. It was held to be 'quite impossible to read into the statutes an intent to create a liability on the part of the insurance carrier completely dissociated from the liability of the insured,' and plaintiff could not recover from the insurer."

In a later case, *Kujawa v. American Indemnity Co.* (Sup. Ct. Wis. 1944), 14 N.W. 2d 31, the Supreme Court had this further comment to say about the *Wiechmann* case at page 33:

"In that case, the action was by the wife to recover damages for the death of her husband who was instantly killed in the accident while riding with Huber, the assured who died shortly after the collision. The action for wrongful death on the part of plaintiff against Huber abated with Huber's death. It was contended that even though the liability of Huber to respond in damages abated upon his death, that nevertheless, the liability of his insurance carrier, General Casualty Company, continued as a direct and independent liability . . . . [T]he court said: 'Under the law and facts of this case, respondent is not entitled to recover for the death of her husband against Huber, the assured because, as conceded by all concerned, her cause of action for wrongful death against him or his estate has abated. It is quite impossible to read into the statutes (secs. 85.93 and 260.11) an intent to create a liability on the part of the insurance carrier completely dissociated from the liability of the insured.'"

A further decision, involving a Missouri action, *Haines v. Harrison* (Sup. Ct. Miss. 1948), 357 Mo. 956, 211 S.W.2d 489, is pertinent. In this case the tort-feasor died and under applicable local law the action of the injured party against the tort-feasor abated. Also under the local law applicable, if the injured party had secured a judgment against the tort-feasor he could have instituted proceedings to compel the insured to satisfy the judgment to the extent of the liability in the insurance contract. There was not, however, a direct action statute in Missouri at the time of this lawsuit. In *Haines,* the injured plaintiff who did not and could not sue the deceased tort-feasor, contended that he had a right to sue the insured directly on the ground that since the condition of securing a judgment against the tort-feasor was impossible, its performance, therefore, ought not to be

required. Plaintiff also contended that securing a judgment against the tort-feasor under the "no-action" provision of the insurance policy was merely a mode of proof of loss. The court in *Haines* held that the action against the defendant insurance company could not be maintained. The court stated at 211 S.W.2d 489, 492 as follows:

> "A contract of insurance, as in this case, provides that the insurer will pay, on behalf of the insured, such sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages. The contract further provides that such payments will not be made unless the conditions of the policy have been complied with. One of these conditions is that the claim must be reduced to judgment unless the insurer shall agree in writing to pay without obtaining such judgment. In this case, by the death of the insured, the cause of action was abated. The insurer can no longer pay on behalf of the insured or his estate because by law there is no liability imposed upon him or his estate. The insurer, under a contract of this nature, becomes liable to third persons through the insured. . . . We are of the opinion that since death abated the liability as to the tort-feasor it also terminated any liability in the insured's contract. Therefore, the death of the tort-feasor not only rendered it impossible to establish liability by judgment against the tort-feasor, but it ended any liability for the tort."

This case, together with the *Wiechmann* case, seem to be the sole authority for the precise issues raised in this appeal and, in the absence of contrary statutory provisions obtaining in Guam, should control on this appeal.

CONCLUSION

Causes of action for personal injury and wrongful death abate in Guam upon the death of the tort-feasor before commencement of any action against him. Neither the direct action statute in Guam, the Guam Financial Responsibility Law, nor any other provision of law in Guam create or suggest a public policy giving an injured party a direct cause of action against the tort-feasor's insurance company where the action against the tort-feasor has abated because of his death. In fact, the direct action against a tort-feasor's insurance company is wholly dependent upon the existence of a valid cause of action against the tort-feasor whether the tort-feasor is actually named or sued.

Wherefore, appellant respectfully requests that this court set aside and reverse the judgment of the lower court and direct entry of judgment in favor of appellant.

Dated at Oakland, California,
October 26, 1965.

BARRETT, FERENZ & TRAPP
WALTER S. FERENZ
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALTER S. FERENZ
Attorney for Appellant